Bong Kim Son v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41-2 OF 1997
AUGUSTINE PAUL JC
12 NOVEMBER 1997

Criminal Procedure *— Complaint — Private prosecution of — Procedure regarding issue of process — Whether oral examination of complainant on oath before magistrate is mandatory — Whether such procedure must be followed even if there is a written complaint — Whether omission is curable — Criminal Procedure Code (FMS Cap 6) ss 128, 133(i) & 422*

Criminal Procedure *— Complaint — Proper respondent on appeal — Accused appealing against conviction — Whether complainant should be made the respondent on appeal — Whether the only proper party in such cases is the Public Prosecutor — Criminal Procedure Code (FMS Cap 6) s 308*

The respondent filed a written complaint for the issue of a private summons against the appellant for an offence under s 352 of the Penal Code (FMS Cap 45). The summons was signed by the respondent before a magistrate at the Magistrate's Court, Melaka and issued against the appellant. A trial against the appellant was commenced before the magistrate and at the conclusion of the trial, the appellant was found guilty and sentenced to a day's imprisonment and a fine of RM300 or a month's imprisonment in default. The appellant appealed against the order with the complainant named as respondent. At the hearing of the appeal, counsel for the appellant applied for the respondent to be substituted with the Public Prosecutor as the latter should be the proper party. Counsel further submitted that the respondent did not appear before a magistrate for the purpose of being examined orally on oath as required by s 133(i) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). It was argued that this omission was fatal and not curable under s 422 of the CPC.

Held, allowing the appeal:

(1) Section 308 of the the CPC states that in an appeal by an accused against conviction and/or sentence (save as provided for by ss 378 and 379), no one but the Public Prosecutor has rights of audience. Therefore, in this private complaint on appeal, the proper respondent to the appeal should be the Public Prosecutor (see p 650D–E); *Ponniah v Lim* [1960] MLJ 152 followed.

(2) As compliance with s 133(i) of the CPC is a mandatory requirement, the issue of a summons in breach of the section is an illegality and, therefore, is not curable under s 422 of the CPC. In this case, the defect went to jurisdiction and the issue of the summons was void. In such circumstances, the fact that no objection was taken at an earlier stage was irrelevant (see p 655D–I); *Re Rasiah Munusamy* [1983] 2 MLJ 294 and *Aiyar v Nathan* AIR 1948 Mad 424 followed.

Per curiam:

Section 2 of the CPC defines a 'complaint' as an 'allegation made orally or in writing to a Magistrate ...'. This does not mean that the procedure in dealing with a complaint as laid down in s 133(i) of the CPC does not apply where there is a written complaint. The manner of usage of the word 'complaint' in s 133(i) without qualification makes the procedure applicable to any form of complaint. Section 128 of the CPC which deals with cognizance of offences by magistrates upon receiving a complaint as defined by the CPC has been enacted 'Subject to the provisions of this Code ...'. That section is therefore subject to s 133(i) and the procedure laid down therein must be followed even if there is a written complaint. As the summons in this case was issued based merely on the written complaint of the respondent, it is in breach of the mandatory requirements of s 133(i) of the CPC which requires the magistrate to examine the complainant orally on oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant (see pp 653I and 654A–C).

[Bahasa Malaysia summary

Penentang telah memfailkan suatu aduan bertulis untuk pengeluaran satu saman persendirian terhadap perayu untuk kesalahan di bawah s 352 Kanun Keseksaan (NMB Bab 45). Saman telah ditandatangani oleh penentang di hadapan majistret di Mahkamah Majistret, Melaka dan dikeluarkan terhadap perayu. Satu perbicaraan terhadap perayu bermula di hadapan majistret dan di penutup perbicaraan, perayu didapati bersalah dan dijatuhkan hukuman pemenjaraan sehari dan denda sebanyak RM300 atau pemenjaraan selama sebulan jikalau ingkar. Perayu merayu terhadap perintah dengan menamakan pengadu sebagai penentang. Di pembicaraan rayuan, peguam perayu memohon supaya penentang diganti dengan Pendakwa Raya kerana Pendakwa Raya ialah pihak yang wajar. Peguam selanjutnya menghujahkan bahawa penentang tidak hadir di hadapan majistret untuk tujuan pemeriksaan secara lisan atas sumpah seperti yang dikehendaki oleh s 133(i) Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Ia dihujahkan bahawa peninggalan ini adalah padah dan tidak boleh dipulihkan di bawah s 422 KAJ.

Diputuskan, membenarkan rayuan:

(1) Seksyen 308 KAJ menyatakan bahawa dalam suatu rayuan oleh seorang tertuduh terhadap sabitan dan/atau hukuman (melainkan diperuntukkan oleh ss 378 dan 379), tiada sesiapa kecuali Pendakwa Raya mempunyai hak untuk didengar. Maka, dalam aduan persendirian atas rayuan ini, penentang yang betul ialah Pendakwa Raya (lihat ms 650D–E); *Ponniah v Lim* [1960] MLJ 152 diikut.

(2) Oleh kerana pematuhan s 133(i) KAJ adalah keperluan yang mandatori, pengeluaran satu saman yang melanggar seksyen itu adalah satu kepenyalahan dan, dengan itu, tidak boleh dipulihkan di bawah s 422 KAJ. Dalam kes ini, kecacatan adalah berkenaan bidang kuasa dan pengeluaran saman adalah tak sah. Dalam keadaan ini, hakikat bahawa tiada bantahan telah diambil pada peringkat yang lebih awal adalah tidak relevan (lihat ms 655D–I); *Re Rasiah Munusamy* [1983] 2 MLJ 294 dan *Aiyar v Nathan* AIR 1948 Mad 424 diikut.

Per curiam:

Seksyen 2 KAJ mentakrifkan 'aduan' sebagai 'pengataan yang dibuat secara lisan atau secara bertulis kepada Majistret ...'. Ini tidak bermakna bahawa prosedur dalam menguruskan suatu aduan seperti yang dinyatakan dalam s 133(i) KAJ tidak terpakai di mana terdapat aduan bertulis. Cara perkataan 'aduan' digunakan dalam s 133(i) tanpa syarat menjadikan prosedur itu terpakai kepada sebarang bentuk aduan. Seksyen 128 KAJ yang berkaitan dengan mengambil tahu mengenai kesalahan oleh majistret apabila menerima sesuatu aduan seperti yang ditakrifkan oleh KAJ telah digubal 'Tertakluk kepada peruntukan Kanun ini ...'. Maka seksyen tersebut adalah tertakluk kepada s 133(i) dan prosedur yang dinyatakan dalamnya mestilah dipatuhi sekalipun terdapat aduan bertulis. Oleh kerana saman dalam kes ini dikeluarkan berdasarkan aduan bertulis penentang sahaja, ia melanggar keperluan mandatori s 133(i) KAJ yang menghendaki majistret memeriksa pengadu secara lisan atas sumpah dan mempertuliskan intipati pemeriksaan yang hendaklah ditandatangani oleh majistret dan pengadu (lihat ms 653I dan 654A–C).]

Notes

For cases on complaint, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 947–968.

Cases referred to

Adlan v PP [1965] 1 MLJ 142 (refd)
Ahmad bin Hashim v PP [1950] MLJ 1 (refd)
Aiyar v Nathan AIR 1948 Mad 424 (folld)
Chandra v Mandal AIR 1949 Cal 55 (refd)
Cheong Sik Kwan v PP [1959] MLJ 189 (refd)
Chia Cheng Ho & Anor v PP [1974] 1 MLJ 61 (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1 (refd)
Hardial Singh v Faridah bte Haron & Ors [1988] 2 MLJ 465 (refd)
Hazra v Mahato AIR 1957 Cal 395 (refd)
Ishak Shaari v PP [1997] 3 CLJ Supp 223 (refd)
Lee Sang Cheah v R [1946] MLJ 22 (refd)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp [1986] 2 MLJ 124 (refd)
PP v Leonard [1960] MLJ 13 (refd)

PP v Sajjan Singh [1958] MLJ 3 (refd)
Papathy v PP [1956] MLJ 18 (refd)
Ponniah v Lim [1960] MLJ 152 (folld)
Pulukuri Kottaya & Ors v Emperor AIR 1947 PC 67 (refd)
Rasiah Munusamy, Re [1983] 2 MLJ 294 (folld)
Saminathan v PP [1953] MLJ 36 (refd)
Saw Kim Hai v Anor v R [1956] MLJ 21 (refd)
See Yew Poo v PP [1949] MLJ 131 (refd)
Sykt Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201 (refd)
Tan Boon Liat @ Allen & Anor et al, Re [1977] 2 MLJ 108 (refd)
Wong Liang Nguk v PP [1953] MLJ 246 (refd)
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2, 107, 128, 133, 133(1), 134, 135, 422
Penal Code (FMS Cap 45) s 352

Kesavan a/l P Krishnan (*Kesavan & Associates*) for the appellant.
Anslem Charles Fernandis (Deputy Public Prosecutor) for the respondent.

Augustine Paul JC: This appeal before me concerns certain aspects of the law relating to private summonses.

On 2 March 1993, one Chung Ah Yu ('the respondent') filed a written complaint for the issue of a private summons against one Bong Kim Son ('the appellant') for an offence under s 352 of the Penal Code (FMS Cap 45). Annexed to the complaint were copies of a police and a medical report. The complaint was signed by the respondent before a magistrate attached to the Magistrate's Court, Melaka. On 4 March 1993, a summons was issued against the appellant in respect of the following charge:

> Bahawa kamu Bong Kim Son @ Bong Ah Son pada 2 Ogos 1992 jam lebih kurang 6.15 petang di Solok Sokyah, Cheng, dalam Negeri Melaka telah menyerang dan melakukan jenayah secara kekerasan dengan memukul dan menendang Chung Ah Yu dan bahawa kamu telah melakukan satu kesalahan di mana kamu boleh dihukum di bawah s 352 Kanun Keseksaan (NMB Bab 45).

On 3 October 1996, the trial against the appellant commenced before the learned magistrate. Both parties were represented by counsel. At the conclusion of the trial on 7 January 1997, the appellant was found guilty and the sentence imposed was a day's imprisonment and a fine of RM300 in default one month's imprisonment. The appellant lodged an appeal against this order with the complainant as respondent. The record of appeal was then prepared and filed in the High Court.

When the appeal came up for hearing before me on 5 May 1997, learned counsel for the appellant applied for the respondent to be substituted

with the Public Prosecutor as the latter should be the proper party. I requested the learned deputy public prosecutor — who was then present in court for another matter — to address me on the point raised. The learned deputy requested another date to submit on the issue raised and the case was accordingly fixed for further hearing on 23 May 1997. On the adjourned date, the learned deputy appeared and in a commendable reflection of the high traditions of the office of Public Prosecutor, supported the application of the appellant. In doing so, he referred me to *Ponniah v Lim* [1960] MLJ 152 and *Hardial Singh v Faridah bte Haron & Ors* [1988] 2 MLJ 465. It is sufficient for me to refer to *Ponniah* in support of the application by the appellant. In that case, the appellant was convicted in the Magistrate's Court at Klang for assault in contravention of s 352 of the Penal Code. The prosecution was a private one and on appeal the preliminary point arose as to whether the proper respondent to the appeal was the complainant or the Public Prosecutor. In holding that the proper respondent was the Public Prosecutor, Thomson CJ (as he then was) said (at the same page):

> To my mind, the question can be determined by reference to s 308 of the Criminal Procedure Code which provides that in the case of an appeal from the decision of a magistrate, copies of the record are to be transmitted to the Public Prosecutor and to the appellant. That section is to be considered not only within its own four walls but also in the light of certain statements of principle by the court in India.
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> In the first place, I would refer to the judgment of Mr Justice Bose in the case of *Kartikram v Emperor* AIR 1937 Nag 123. Having dealt in detail with certain sections of the Indian Code, his Lordship went on to observe:
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> > 'The interests of the Crown and the complainant are not always the same. Private parties often wish to serve their own private ends, and criminal proceedings are not primarily designed for that. It would be unfortunate to allow private passions and prejudices to creep into the conduct of a criminal trial, when it can be avoided. It would be even more undesirable to leave the matter in two sets of hands with a possible conflict of interests; undesirable generally from the broad view-point of public policy, undesirable also because it would be unfair to the accused. Therefore, if the other side is properly represented by the Crown, not only has the complainant no right of audience, but ordinarily he should not be allowed to appear at all.'
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> I would then refer to the judgment of the Chief Justice of Sind, Mr Justice Davis, in *Tarapore v Emperor* AIR 1942 Sind 5. Again, I am not concerned with his Lordship's examination of the sections of the Indian Code involved in that case but having completed that examination, his Lordship made the following observations:
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> > 'In an appeal, the case has proceeded from a trial to a conviction. The Crown is now directly concerned in the case. The accused is no longer under trial. He has become a convicted person. The Crown is responsible for carrying out the sentence passed by the Court. Furthermore, the Public Prosecutor stands not necessarily for conviction but for justice, and it would be affectation to pretend that an advocate for a complainant appearing for a complainant, vitally affected, as is alleged in this

application, in maintaining the conviction, would present the case before the court in the same manner as a Public Prosecutor who has not the same personal interest in the case.' A

Finally, I would refer to Sir John Beaumont's judgment in the case of *Bhulabhai v Bawabhai* AIR 1940 Bom 14. That case is of particular importance because His Lordship confined his examination of the Indian Code to s 422. I am aware that s 422 of the India Code is not word for word the same as any section in our Code but the relevant portion of it is very similar to the provisions of our s 308. Having referred to s 422, his Lordship went on to say: B

'In my opinion, nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction.' C

Approaching the matter in the light of these statements of principle which, although technically they are not binding upon me, I adopt, I have no hesitation in saying that under our Code, it follows from the provisions of s 308 that the only respondent to an appeal against conviction and/or sentence of a convicted person is the Public Prosecutor and that save as provided for by ss 378 and 379 no one has any right of audience. D

I think the proper course here is to make an order striking out Mrs Lim as the respondent, substituting as respondent the Public Prosecutor and ordering service on him.

Accordingly, I allowed the application to strike out the respondent and substituted him with the Public Prosecutor as the respondent. E

At the hearing of the appeal on its merits on 3 November 1997, learned counsel for the appellant raised various issues. What I considered to be of importance was his forceful agrument that the procedure laid down in the Criminal Procedure Code (FMS Cap 6) ('the Code') regulating the issue of private summons has not been followed when the summons was issued in this case. Before I consider his submission and that of the learned deputy, it is first necessary to reproduce the relevant provisions of the Code pertinent to the objection raised. F

Section 128:

(i) Subject to the provisions of this Code a Magistrate may take cognizance of an offence — G
   (a) upon receiving a complaint as defined by this Code;
   (b) upon his own knowledge or suspicion that such offence has been committed;
   (c) whenever it appears to the Public Prosecutor that an offence has been committed and he, by warrant under his hand, requires a Magistrate to inquire into the same and such Magistrate receives the warrant; H
   (d) on any person being brought before him in custody without process accused of having committed an offence which such Magistrate has jurisdiction to try.

(ii) When a Magistrate takes cognizance of an offence under clause (b) the accused or, when there are several persons accused, any one of them shall be entitled to require that the case shall not be tried by such Magistrate but shall be tried by another Magistrate. I

Section 133:

(i) When a Magistrate takes cognizance of an offence on complaint the Magistrate shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate.

(ii) This section shall not apply to a complaint of an offence where a summons is applied for in a summons case made by a police officer or by a public servant acting in his official capacity.

Section 134:

If the Magistrate sees reason to doubt the truth of a complaint of an offence of which he is authorized to take cognizance he may, when the complainant has been examined, record his reason for doubting the truth of the complaint and may then postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or direct some police officer to make inquires for the purpose of ascertaining the truth or falsehood of the complaint and report to him the result of such inquiries.

Section 135:

(i) The Magistrate before whom a complaint is made may dismiss the complaint if after examining the complainant and recording his examination and considering the result of the inquiry, if any, made under the last preceding section there is in his judgment no sufficient ground for proceeding.

(ii) The Magistrate if he dismisses the complaint shall record his reasons for so doing.

In his submission, learned counsel said that the written complaint of the respondent was prepared by his counsel who then filed it. He said that there is no evidence on record to show that the respondent appeared before a magistrate for the purpose of being examined orally on oath as required by s 133(i) of the Code and as explained in *Re Rasiah Munusamy* [1983] 2 MLJ 294. He contended that this omission is fatal. The learned deputy conceded that the procedure as enunciated in *Re Rasiah Munusamy* had not been followed. However, he attempted to distinguish that case from the facts of this case. He said that in this case the summons had been issued and the trial had been concluded. He referred to cases such as *Saw Kim Hai & Anor v R* [1956] MLJ 21, *Saminathan v PP* [1953] MLJ 36, *Lee Sang Cheah v R* [1946] MLJ 22, *Wong Liang Nguk v PP* [1953] MLJ 246 and *PP v Sajjan Singh* [1958] MLJ 3 and argued that once the accused is before the court, there is jurisdiction to try him and the court is not concerned with how he got into the dock. He concluded by saying that the failure to adhere to the requirements of s 133(i) of the Code is a curable defect as it is a breach of a mere procedural requirement. At the adjourned hearing on 11 November 1997 granted at the request of both parties, the learned deputy referred to *Chia Cheng Ho & Anor v PP* [1974] 1 MLJ 61 and *Gnanasegaran a/l Pararajasingam v PP* [1997] 3 MLJ 1 and contended that the objection must have been taken by the appellant at the

trial in the magistrate's court and that it was too late to do so now. Learned counsel did not agree with this view.

As the provisions of the Code that I have reproduced earlier refer to a 'complaint', it is necessary to determine the meaning of that expression. It must be distinguished from an 'information' which is a statement relating to the commission of an offence made to a police officer under s 107 of the Code while a 'complaint' is an allegation made to a magistrate with a view to his taking action under the Code (see *PP v Leonard* [1960] MLJ 13). Section 128 of the Code provides that subject to the provisions of the Code, a magistrate may take cognizance of an offence upon receiving a complaint 'as defined by this Code'. Section 2 of the Code defines a 'complaint' as an:

> ... allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence; ... .

Section 133 of the Code provides that when a magistrate takes cognizance of an offence on complaint, he shall examine the complainant upon oath. However, it is expressly stated that this section is not to apply to a complaint of an offence where a summons is applied for by a police officer. The following ss 134 and 135 of the Code clearly only apply where the complainant is examined on oath under s 133 and therefore cannot apply where the summons is applied for by a police officer. Edgar Joseph Jr J (as he then was) dealt with these provisions exhaustively *Re Rasiah Munusamy* and said at pp 294–295:

> Now, with the exception of complaints of an offence where a summons is applied for by a police officer or a public servant acting officially, the very first thing the magistrate must do upon receipt of a complaint under s 133(i), and that of course includes a complaint under s 132 which provides specially for offences of enticement of spouse in contravention of s 498 of the Penal Code, is at once to examine the complainant upon oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant. It is a sort of a preliminary enquiry but care must be taken not to inquire into the case for the defence: *Teoh Chong Si v Nunn* 11 SSLR 80. Consequently, the letter written by a firm of solicitors on behalf of the person complained against in this case containing exculpatory statements was rightly disregarded by the learned magistrate and I would add, that in any case, it was also objectionable as its contents were hearsay and unsworn.
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> A person complained against is not a party to the proceedings for he is not yet an accused person so he is in no position to claim a right to be represented. However, he is entitled to attend the proceedings like any member of the public though he has no locus standi as a party: *Sheikh Chand v Mohamed Hanif* 8 Cr LJ 20; and a magistrate may, if he so wishes, examine or question him: *Jinilal Mandal v Chanderdeo Prosad* AIR 1941 Pat 419. But, again, care must be taken not to convert the enquiry into a trial before a trial, I am aware that there is some conflict of authority in India as to whether it is irregular to call upon the person complained against to be present at the enquiry and to question him but I consider that exceptionally where the magistrate considers it is essential to do so, he may

A exercise that power, always taking care to ensure that the right of silence is not abrogated: *Manindra Nath v Anil Chandra* AIR 1953 Cal 689.

It follows, therefore, that merely to call the complainant to attest the complaint upon oath is not sufficient nor would it be sufficient to follow this up with an unrecorded and unsworn interview. There is no doubt that the requirements I have outlined above are mandatory, their object being to
B enable the magistrate to decide on the veracity of the complaint for upon that will depend his decision as to whether or not a process should issue. It goes without saying that this is a serious matter since the indiscriminate issue of process encourages mischievous and malicious complaints resulting in harassment to the person complained against and a waste of public time and money as far as the courts are concerned. This is why it is essential that
C the statutory prerequisites are rigidly and meticulously complied with. There is a wealth of Indian authority to support this proposition and they are conveniently collected in the *AIR Commentaries on the Indian Criminal Procedure Code* by Chitaley and Rao (7th Ed, Vol 2) p 473 et seq, dealing with s 200 of the Indian Code which is in pari materia with our s 132.

The record provided also showed clearly that there was not even a
D semblance of compliance with the requirements to which I have already adverted. I accordingly did not have the slightest hesitation in concluding that the order by the learned magistrate directing the issue of a warrant of arrest in this case was made without jurisdiction and was therefore void.

And at p 296:

E The magistrate having conducted the examination of the complainant in accordance with the requirements of s 133(i) may conclude that he has 'reason to doubt the truth of the complaint' in which case he may postpone the issue of process to enable inquiries to be made either by himself or, what is probably far more feasible in practice, by the police who will in due
F course, report to him the result of such inquiries: (s 134).

Another possible result of the examination by the magistrate of the complainant under s 133(i) may be that the magistrate finds 'no sufficient ground for proceeding' in which case he would simply dismiss the complaint but taking care to record his reasons for doing so: (s 135(i) and (ii)).

If, on the other hand, the magistrate after having dealt with the case in
G the manner prescribed by s 133(i) is satisfied that a prima facie case is disclosed by the complaint, it does not follow that he is bound to issue a warrant for he clearly has a discretion, if he thinks fit, to issue a summons for causing the accused to appear in court instead of a warrant: s 136(ii). In exercising his discretion in the matter, the magistrate will, no doubt, amongst other considerations, take into account not only the nature of the offence,
H but also, the probability, of the person complained against absconding, whether an element of urgency is involved, as for instance, where the immediate issue of a warrant may lead to such person being apprehended in incriminating circumstances.

There is one other matter that I would like to consider in this area of the
I law before going any further. Section 2 of the Code defines a 'complaint' as an 'allegation made orally or in writing to a Magistrate ...'. This does not mean that the procedure in dealing with a complaint as laid down in s 133(i) of the Code does not apply where there is a written complaint. The manner of usage of the word 'complaint' in s 133(i) without

qualification makes the procedure applicable to any form of complaint. Section 128 of the Code which deals with cognizance of offences by magistrates upon receiving a complaint as defined by the Code has been enacted 'Subject to the provisions of this Code ...'. That section is therefore subject to s 133(i) and the procedure laid down therein must be followed even if there is a written complaint. In this regard, *Sarkar on Criminal Procedure* (7th Ed) says at p 637:

> If a magistrate takes cognizance of an offence ... he must: (i) examine upon oath the complainant (even though the complaint is in writing) ... .

As the summons in this case was issued based merely on the written complaint of the respondent, it is in breach of the mandatory requirements of s 133(i) of the Code which requires the magistrate to examine the complainant orally on oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant.

What now requires consideration is the effect of the proceeding following the issue of the summons in contravention of the statutory requirement. Whether this defect is curable or not depends on the scope of s 422 of the Code which reads as follows:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account —
>
> of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceeding before or during trial, or in any inquiry or other proceeding under this Code; or of the want of any sanction required by section 129; or
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> of the omission to settle or revise any list of jurors or assessors;
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> of the want of qualification of any juror or assessor; or
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> of the improper admission or rejection of any evidence; or
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> of any misdirection in any charge to jurors or assessors,
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> unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

The first observation to be made is that the section is applicable to a final order made in a proceeding even though the error, omission or irregularity occurred '... before or during trial ...'. Thus the section can be invoked when the error, omissions or irregularity complained of occurred before the commencement or during the course of the trial. The curability of a defect in a trial which has been concluded would depend on whether the defect comes within the ambit of the section. If it does not, the order made in the trial may be reversed or altered. I had occasion to consider this section in *Ishak Shaari v PP* [1997] 3 CLJ Supp 223 in some detail. The section has no application where the breach complained of is an illegality (*See Yew Poo v PP* [1949] MLJ 131). As the Privy Council observed in *Pulukuri Kottaya & Ors v Emperor* AIR 1947 PC 67, when a trial is conducted in a manner different from that prescribed by the Code, the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some

irregularity occurs in the course of such conduct, the irregularity can be cured. The Privy Council further said that the distinction between an illegality and an irregularity is one of degree rather than of kind. It must be noted that there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions (see *Re Tan Boon Liat @ Allen & Anor et al* [1977] 2 MLJ 108). The trilogy of the then Court of Appeal cases of *Ahmad bin Hashim v PP* [1950] MLJ 1; *Papathy v PP* [1956] MLJ 18 and *Cheong Sik Kwan v PP* [1959] MLJ 189 have pronounced that where a trial is conducted in contravention of any provisions of the Code, there is an illegality which cannot be cured and that any conviction had cannot be sustained. In *Adlan v PP* [1965] 1 MLJ 142, Ong J (as he then was) said that s 422 cannot be invoked where there is a breach of a cardinal principle in the administration of justice. The same view was expressed by the (then) Supreme Court in *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714.

Compliance with s 133(i) of the Code is a mandatory requirement (see *Re Rasiah Munusamy* and *Hazra v Mahato* AIR 1957 Cal 395). The issue of a summons in breach of the section is an illegality (see *Chandra v Mandal* AIR 1949 Cal 55). In *Re Rasiah Munusamy*, it was held that an order made without compliance with s 133(i) of the Code amounts to one being made without jurisdiction and is therefore void. I find *Aiyar v Nathan* AIR 1948 Mad 424 to be pertinent and of direct relevance to the issues before me. In that case, Govinda Menon J said at pp 426–427:

> The failure by the magistrate to observe this mandatory provision of the Code cannot be cured, in my opinion, by s 537, Criminal Procedure Code. The non-examination on oath is not an error, omission or irregularity in the complaint. It is a non-observance of a mandatory provision of law, the infraction of which, is, according to the decision of their Lordships of the Judicial Committee in 25 Mad 61 a disregard of an express provision of law as to the mode of inquiry and as such was not a mere irregularity such as could be remedied by s 537, Criminal Procedure Code. It is an illegality which goes to the very root of the proceedings. I am therefore of opinion that the learned Chief Presidency Magistrate has erred in law in not complying with the provisions of s 202, Criminal Procedure Code. The order of the learned magistrate is set aside and he is directed to enquire into the matter afresh by examining the complainant on oath and dispose of the complaint according to law, in the light of the observations in this judgment.

As the defect in the issue of the summons in the appeal before me is an illegality, it is not curable under s 422 of the Code. In this case, the defect goes to jurisdiction and the issue of the summons is void. In such circumstances, the fact that no objection was taken at an earlier stage is irrelevant. Even in the case of evidence which is inadmissible, it does not become admissible by reason of failure to object (see *Sykt Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201 and *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124). As the trial is a nullity, it cannot therefore be validated by a failure to object.

I therefore allow the appeal and quash the conviction and sentence imposed by the learned magistrate and direct him to enquire into the matter afresh by examining the complainant on oath and dispose of the complaint in accordance with law. Of course, if the complainant is no longer interested in proceeding with the matter no further action may be necessary. I further order that the fine paid by the appellant is to be refunded to him.

Appeal allowed.

Reported by S Sankey